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No. 01-1266

IN THE

Supreme Court of the United States

UNITED PARCEL SERVICE, INC.,

Petitioner,

v.

JANA L. MORTON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

As the petition makes clear, the Ninth Circuit panel below (Reinhardt, Tashima, and Berzon, JJ.) departed from the legal rules followed in other circuits in two key respects. First, the Ninth Circuit held that a job duty is not an "essential function" under the Americans with Disabilities Act (the "ADA") if the employer could reassign that duty to other employees. That holding is squarely contrary to the law in numerous other circuits. Second, the Ninth Circuit adopted the bona fide occupational qualification test for evaluating an employer's job qualification standard under the ADA, and expressly refused to adopt either the "direct threat" test advocated by the EEOC or the traditional business necessity test employed by other courts of appeals.

In response to this persuasive showing of the need for this Court's review, respondent ignores the clear holdings of the Ninth Circuit and blithely denies that the court below announced any legal rules at all. Rather than confront the stark conflicts created by the decision below, respondent engages in lengthy but irrelevant discussion of the facts of the cases upon which UPS relies and, in the end, rests her opposition to further review on the oft-repeated mantra that the "essential function" and "qualification standard" issues are fact-specific and must therefore be resolved by a jury.

Respondent's ostrich-like approach to the Ninth Circuit's opinion notwithstanding, the decision below plainly amounts to far more than a simple factual exposition governed by uncontroversial and well-established legal rules. The Ninth Circuit's published decision instead articulates and rests upon legal rules that are irreconcilable with the rules of law adopted and applied by other courts of appeals construing the same important federal statute. The decision below works substantial mischief, and this Court's review is essential to avoid subjecting employers in the Nation's most popu-

lous circuit to the pernicious effects of the Ninth Circuit's holdings.[1]

I. The Circuit Conflict Over The Definition Of "Essential Function" Is Squarely Presented And Merits Plenary Review

Respondent denies that the Ninth Circuit held that the possibility of reassigning a task to other employees renders that task non-essential. Opp. 7-9. Instead, according to respondent, the Ninth Circuit announced no rule of law at all, and held only that "on the record before it, there were controverted factual issues." Opp. 9.

Respondent's characterization of the decision below simply ignores the plain language of the Ninth Circuit's opinion. Even a cursory reading of the court's "essential function" analysis reveals that the dispositive question under the Ninth Circuit's test was whether it would be "possible to keep a swing driver fully occupied with driving assignments if she were precluded from driving DOT vehicles." Pet. App. 10a. Thus, the court emphasized that the evidence purportedly "tends to show that a swing driver operating only non-DOT vehicles would be occupied full time servicing the assigned routes using non-DOT vehicles." *Id.* And the court

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[1] Respondent's lead argument is that the petition does *not* challenge the Ninth Circuit's holding that the applicable collective bargaining agreement (the "CBA") does not preclude respondent's requested "accommodation." Opp. 5-6. Respondent's argument is wholly irrelevant, however, because it does not undercut the certworthiness of the questions that UPS *has* presented in the petition. Wholly apart from any CBA-based defense, respondent's inability to perform the "essential functions" of the unassigned package-car driver job and her inability to satisfy the valid requirements of the DOT hearing standard constitute independently sufficient grounds for defeating respondent's ADA claims.

relied on evidence in the record that supposedly supports "an inference that UPS could employ a swing driver limited to driving non-DOT vehicles." Pet. App. 11a.

Indeed, even respondent ultimately concedes this point. According to respondent, the Ninth Circuit reversed the judgment for UPS because "there were genuine issues of material fact in dispute as to whether it would be possible to keep a swing driver fully occupied with driving assignments on non-DOT vehicles." Opp. 9-10. Thus, the Ninth Circuit's "essential function" holding necessarily rests on the erroneous proposition that a job function is not "essential" if the plaintiff could be "fully occupied" with other tasks and the job function at issue could instead be performed by other employees. Pet. App. 10a, 11a.

In a related vein, respondent claims that "neither creating new jobs nor reassignment were even addressed as issues by the Appeals Court." Opp. 8. It is uncontroverted, however, that the job of "swing driver limited to driving non-DOT vehicles" does not currently exist at UPS. In order to satisfy respondent and the court below, UPS would have to reassign the duty of covering DOT routes to other swing drivers so that a new unassigned driver position involving only non-DOT vehicles could be created for respondent. The law is clear that eliminating an "essential function" constitutes the creation of a new job, *Matthews v. Denver Post*, 263 F.3d 1164, 1169 (10th Cir. 2001), but nothing in the ADA requires employers to create new jobs in order to "accommodate" disabled applicants. *E.g.*, *Phelps v. Optima Health, Inc.*, 251 F.3d 21, 27 (1st Cir. 2001) ("An employer is not required by the ADA to create a new job for an employee . . . ."); *Norville v. Staten Island Univ. Hosp.*, 196 F.3d 89, 99 (2d Cir. 1999); *Taylor v. Pathmark Stores, Inc.*, 177 F.3d 180, 195 (3d Cir. 1999); *Burch v. City of Nacogdoches*, 174 F.3d 615, 621 (5th Cir. 1999); *Gile v. United Airlines, Inc.*, 95 F.3d

492, 499 (7th Cir. 1996); *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1305 (D.C. Cir. 1998) (en banc).[2]

Respondent also claims that UPS does not require all of its package car drivers to obtain DOT certification. Opp. 10 & n.4. Contrary to respondent's suggestion, however, the record is clear that individuals like respondent who seek to work as unassigned "swing" drivers are uniformly required to be able to cover DOT routes – which is hardly surprising, since covering routes for absent "bid" drivers (95% of whom drive DOT routes) is the very reason for the existence of the "swing" driver position. In a limited number of instances, senior package-car drivers have developed impairments that cause them to lose their preexisting DOT certifications at a time when they have *already* accrued sufficient seniority to successfully "bid" on one of the few non-DOT routes. Pet. App. 37a-38a. In those limited instances, UPS has allowed such employees – who are no longer unassigned "swing" drivers but are instead entitled to drive a specific "bid" route – to remain employed as drivers of a non-DOT "bid" route, as long as the seniority rights of other workers are not violated. *Id.*; C.A. Supp. Excerpts 0033-0035, 0080-0081.[3]

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[2] Respondent's argument that UPS somehow failed to engage in an interactive accommodation process (Opp. 4-5, 15 n.5) is a red herring. The reasonable accommodation obligation does not require the *elimination* of any essential job functions; to be valid, an accommodation must instead enable the employee to *perform* the essential functions of the job. 42 U.S.C. § 12111(8). The undisputed record shows that no possible accommodation could enable respondent to drive DOT vehicles, and respondent makes no argument to the contrary. Thus, the accommodation issue is entirely irrelevant.

[3] The UPS protocol cited by respondent (Opp. 10 n.4) thus serves to permit package-car drivers with sufficient seniority to drive non-DOT "bid" routes after losing their DOT certification. It does not

Thus, it is undisputed that UPS requires swing drivers to be DOT-certified, and even a package car driver who has sufficient seniority to obtain a fixed route must remain DOT-certified at least until such time as he or she has sufficient seniority to obtain a non-DOT bid route.

In an ineffectual attempt to show that there is no split of authority among the circuits concerning the first question presented, respondent string-cites a number of cases for the proposition that "determining the essential functions of a job requires a case-specific, factual analysis." Opp. 11-12. Such cases are simply beside the point, as the question presented here involves a disagreement over the legal definition of "essential functions," not mere "case-specific, factual analysis" under settled legal principles. The decision below announces and applies a rule of *law* to govern the essential function inquiry. *None* of the cases cited by respondent adopts the Ninth Circuit's view that an employer's ability to reassign a task to other employees renders the task non-essential. It is *that* holding – and not any case-specific factual inquiry – that creates the circuit conflict and requires this Court's review.

Respondent also purports to distinguish the conflicting precedents relied on by UPS, arguing that "[u]nlike Morton, those employees sought accommodations that relieved them of performing essential job functions at all." Opp. 12. But respondent's proffered distinction simply begs the question. In each of the cases cited by UPS, the plaintiff sought to be relieved of the obligation to perform a particular job function on the ground that the function could instead be performed by other employees, but the court nonetheless held that the function was "essential."[4] This case involves the identical

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permit non-DOT-certified applicants like respondent to work as "swing" drivers.

[4] *See, e.g., Emerson v. Northern States Power Co.*, 256 F.3d 506, 513 (7th Cir. 2001) (fact that emergency calls could be "routed to

issue: Respondent seeks to be relieved of the requirement that she be able to cover DOT routes, and argues that that function can be performed by other employees instead. The only difference is that here, the Ninth Circuit held that the ability to reassign job functions to other employees *does* render those functions non-essential. The cases cited by UPS are thus on all fours, and cannot be reconciled with the judgment below.

Respondent's contention that she "is simply requesting use of existing equipment to accommodate her disability and allow her to perform driver assignments" (Opp. 13) is also wide of the mark. Respondent's requested "accommodation" is nothing less than an attempt to avoid having to perform the essential job function of covering for absent drivers of DOT routes, something the ADA does not permit. 42 U.S.C. § 12111(8); *see* note 2, *supra*. Thus, respondent's attempts to deny the existence of the circuit conflict are wholly unpersuasive, and this Court's review is necessary to resolve the conflict created by the Ninth Circuit decision below.

II. The Three-Way Conflict Over The Test For Evaluating The Validity Of Job Qualification Standards Is Squarely Presented Here And Involves An Important Question Of Federal Law

Respondent denies that the Ninth Circuit applied the heightened bona fide occupational qualification ("BFOQ")

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another consultant . . . does not change their essential function status"); *Frazier v. Simmons*, 254 F.3d 1247, 1260 (10th Cir. 2001) ("'The mere fact that others could do [plaintiff's] work does not show that the work is nonessential.'"); *Basith v. Cook County*, 241 F.3d 919, 929 (7th Cir. 2001) (same); *Phelps v. Optima Health, Inc.*, 251 F.3d 21, 26 (1st Cir. 2001) (fact that lifting function could be reassigned "merely shows the job could be restructured, not that lifting was nonessential").

test, rather than the traditional business necessity test, to determine the validity of UPS's job qualification standard requiring its drivers to satisfy the DOT's minimum hearing requirement. Opp. 15-16. Respondent quotes the Ninth Circuit's acknowledgement that "there is no bfoq defense as such under the ADA" as evidence that the court below somehow applied the traditional business necessity defense. *Id.* at 15.

Once again, respondent refuses to acknowledge what the Ninth Circuit actually did in this case. Although the court recognized that there was no textual basis for applying the heightened BFOQ test to assess the validity of qualification standards under the ADA, the Ninth Circuit nonetheless held that employers are required to demonstrate either "that all persons who fail to meet a disability-related safety criterion present an unacceptable risk of danger" or "that it is highly impractical more discretely to determine which disabled employees present such an unacceptable risk – *the Title VII/ADEA bfoq safety standard requirements*." Pet. App. 25a-26a (emphasis added). Thus, the Ninth Circuit unceremoniously – and unambiguously – discarded the business necessity defense established by the plain language of the ADA and in its stead adopted the BFOQ standard, even though that standard appears nowhere in the ADA, but rather in Title VII and the ADEA, statutes designed to address discrimination of an altogether different type. Pet. 26-27.

Respondent contends in the alternative that UPS failed to establish the business necessity defense because the record does not support a finding that the job qualification standard – *i.e.*, the requirement that UPS's drivers satisfy the DOT hearing standard – was job-related or that no reasonable accommodation was possible. Opp. 16-17. The reasonable accommodation issue has been addressed at note 2, *supra*. As for job-relatedness, it is unclear how respondent can argue

in good faith that a hearing standard is unrelated to the job of driving large delivery trucks on public streets.

In any event, UPS easily established the traditional business necessity defense on this record. Its requirement that its drivers satisfy the DOT hearing standard is obviously job-related, because a driver's ability to operate a motor vehicle safely depends in part on how well he or she can hear. C.A. Supp. Excerpts 0089-0091. The requirement of DOT certification is also consistent with business necessity, because it is identical to the federal government's regulation applicable to vehicles only slightly larger than those that respondent seeks to drive. Congress surely did not intend that the ADA be construed to require employers to commission expensive and time-consuming scientific research before adopting safety standards drawn from government safety regulations applicable to closely analogous activities. Indeed, this Court rejected a similar argument in *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 577 (1999). Respondent's attempt to defend the judgment on this ground (which was not addressed by the court below) is without merit.

Respondent attempts to demonstrate the absence of a conflict among the circuit courts by citing authority for the uncontroversial but inapposite propositions that an employer bears the burden of proof regarding the business necessity defense and that the defense requires job-relatedness and business necessity. Opp. 19. Such authority has no bearing whatsoever on whether courts should apply the traditional business necessity defense or, instead, the more stringent BFOQ standard.

Respondent's attempt to distinguish *Belk v. Southwestern Bell Telephone Co.*, 194 F.3d 946 (8th Cir. 1999), serves only to confirm UPS's point. In *Belk*, the Eighth Circuit rejected the plaintiff's attempt to import the BFOQ test from the ADEA, holding instead that the traditional business necessity defense applies to ADA claims regardless of whether

the plaintiff's theory would represent disparate treatment or disparate impact under the ADEA. *Id.* at 951. That holding is directly contrary to the Ninth Circuit's decision below.

Respondent's analysis of *Tate v. Farmland Industries, Inc.*, 268 F.3d 989 (10th Cir. 2001), fares no better. Respondent argues that *Tate* is distinguishable because "DOT does not prohibit Morton from operating UPS's non-DOT vehicles." Opp. 20. Yet in *Tate*, the government's standard was voluntary, not mandatory. Thus, the employer there, like UPS, could have permitted the employee to drive the vehicle at issue. Nevertheless, the Tenth Circuit upheld the employer's qualification standard, holding that "[p]rovided that any necessary job specification is job-related, uniformly-enforced, and consistent with business necessity, the employer has the right to establish what a job is and what is required to perform it." *Id.* at 993. That holding is irreconcilable with the Ninth Circuit's decision.[5]

Therefore, as the petition demonstrates (Pet. 22-23), the Ninth Circuit's adoption of the BFOQ test to evaluate an employer's job qualification standard is directly contrary to the approach used by the Fifth, Eighth, and Tenth Circuits on this precise issue. Pet. 22-23. Those circuits employ the traditional business necessity defense, which this Court has noted "is more lenient for the employer than the statutory BFOQ defense." *International Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 198 (1991).

In addition, respondent does not address the fact that the Ninth Circuit's adoption of the BFOQ standard conflicts with

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[5] Respondent does not even attempt to distinguish *EEOC v. Exxon Corp.*, 203 F.3d 871 (5th Cir. 2000), in which the Fifth Circuit unambiguously adopted the traditional business necessity defense. That decision, like *Belk* and *Tate*, directly conflicts with the Ninth Circuit's holding in this case.

the EEOC's position on this issue. As the petition explains (Pet. 24), the EEOC asserts that safety-related qualification standards must be evaluated according to whether an individual "pose[s] a direct threat to the health or safety of other individuals in the workplace" under 42 U.S.C. § 12113(b). *See* 29 C.F.R. pt. 1630, App. § 1630.15(b)-(c) (requiring showing of direct threat for safety-related job qualification standards). Pet. 24. This case therefore presents an opportunity for the Court to resolve a three-way divergence of authority on this important issue, which governs the validity of a wide array of qualification standards applicable to millions of employees and workplaces across the country.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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